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No. 84-27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IVAN L. SIDNEY, et al.,
Petitioner,

v.

EVELYN JAMES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTEI

1. Whether the San Juan Southern Paiute Tribe is entitled to an evidentiary hearing as to its status as a tribe?

2. Whether the San Juan Southern Paiute Tribe's Motion To Intervene As of Right was timely in light of all the circumstances?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE.....1

REASONS FOR DENYING THE PETITION.....7

I. The Issues Involved Are Not Important Enough to Warrant Review.....7

II. The Ninth Circuit Court of Appeals Correctly Construed 25 U.S.C.§ 640d-7(a).....9

III. The Motion To Intervene Was Timely in Light of All the Circumstances.....14

CONCLUSION.....17

TABLE OF AUTHORITIES

Page

CASES

Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir) (per curiam), cert. denied, 439 U.S. 837 (1978).....14

Arizona v. California, ____U.S.____ 75 L.Ed 2d 318 (1983).....16

Healing v. Jones, 210 F. Supp. 125 aff'd. Jones v. Healing, 373 U.S. 758 (1963).....11-13

Mashpee Tribe v. New Seabury Corp., 595 F.2d 575, 582 (1st Cir. 1979).....8-10

NAACP v. New York, 413 U.S. 345 (1973).....15

Sekaquaptewa v. McDonald, 448 F. Supp 1183 (D. Ariz. 1978), aff'd in part, rev'd in part and remanded, 619 F.2d 801 (9th Cir. 1980) cert. denied, 449, U.S. 1010 (1980).....8,.15-6

STATUTES

25 U.S.C. § 640(d)-7(a).....3,.5,.6,.8,.9,.10,.13

Act of June 14, 1934
48 Stat. 960.....2-5,.8,.9,.15

OTHER

25 C.F.R. Part 8(3).....1

Publ. Law 85-547, 72 Stat.
403 (1958).....11

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The San Juan Southern Paiute Tribe is a small, as yet federally unrecognized, tribe of Indians which claims a right to land also claimed by the Hopi and Navajo Tribes.[1/]

[1/] A petition for recognition is pending. The procedure for such petition is set out in 25 C.F.R., Part 83.

The Act of June 14, 1934, 48 Stat. 960 (App. E, Petitioner's Brief) provides:

> All vacant, unreserved and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive Order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882. (emphasis supplied).

On the date of the Act, of the San Juan Southern Paiute Tribe was located within the area described. The Act of 1934 confirmed their rights.

Since passage of the Act, there has been continuing controversy over the nature and extent of each parties' interest. The Hopi and Navajo eventually embarked on separate lobbying efforts to obtain a resolution of the problem. Congress responded by authorizing a quiet title action pursuant to 25 U.S.C. § 640(d)-7(a) (App. D, Petitioner's Brief) which provides:

> Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of

December 16, 1882 for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes. (Emphasis supplied).

Pursuant to this statute, the Hopi Tribe sued the Navajo Tribe to determine their relative rights to the land described in the Act of June 14, 1934 48 Stat. 960. The Navajo Tribe counterclaimed against the Hopi Tribe. The San Juan Southern Paiute Tribe (hereinafter Paiute Tribe) was not joined as a party defendant even though the Tribe has a claim under the 1934 Act.

In August of 1982, the Paiute Tribe (and its spokesperson) filed a motion to intervene on the grounds that it was a tribe having an interest

in the area described in the Act of June 14, 1934, supra, and therefore had a right to participate in the suit pursuant to 25 U.S.C. § 640d-7(a), supra, and "the disposition of the action may impair or impede their ability to protect that interest." The trial court, after hearing argument of counsel, but without granting an evidentiary hearing as requested denied the motion to intervene on the grounds that: 1) it lacked jurisdiction and 2) "under the permissive intervention section, the motion or request is denied because it simply comes too late in an already complicated case." (App. B, Pet. Brief).

On appeal, the Ninth Circuit Court of Appeals reversed the order

denying the motion to intervene. It held that neither the Hopi Tribe nor the Navajo Tribe had demonstrated sufficient prejudice to support a finding that the motion to intervene as of right was not timely and that "the denial of the Paiutes' right to intervene may practically impair the Paiutes' ability to assert their rights in a future action." It also held that the Court erred in not holding an evidentiary hearing on the question of whether the Paiutes are a "tribe" under 25 U.S.C. § 640d-7(a) prior to ruling on the question of subject matter jurisdiction. One judge dissented (Appendix A). The Hopi and Navajo Tribes both petitioned for rehearing en banc. The petition was denied with all judges on the

panel opposed to the suggestion for rehearing en banc and no judge of the full court requesting a vote on the suggestion for rehearing en banc (Appendix C).

The Navajo Tribe has not petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. The Issues Involved Are Not Important Enough to Warrant Review.

Rule 17 of this Court's rules provides that a review on writ of certiorari will be granted only when there are special and important reasons therefore. This case involves a situation unlikely to be repeated. The decision below gives the San Juan Southern Paiute Tribe the right to a

hearing. If it is not a tribe, then it cannot proceed with its land claim pursuant to 25 U.S.C. § 640d-7(a). If it is a tribe, it will be allowed to prove its claim to land which federal law confirmed in it. The right to a hearing on the issue is a basic one. Cf. Mashpee Tribe v. New Seabury Corp. 595 F.2d 575, 582 (1st Cir. 1979). 2/

2/Petitioners argue that this court has in the past provided definitive interpretations of disputed federal laws dealing with the division of properties among competing Indians or Indian groups (Pet., pp. 11-12). This court declined to review the decision setting forth the ground rules under the 1934 Act. Sekaquaptewa v. MacDonald, 448 F.Supp. 1183 (D. Ariz. 1978), aff'd in part, rev'd in part and remanded, 619 F.2d 801 (9th Cir. 1980) cert. denied, 449, U.S. 1010 (1980). The case at issue here involves a jurisdictional question and is unlike the cases Petitioner cites.

This case does not present the type of question this Court should review. This is confirmed by the fact that the Navajo Tribe has not filed a petition seeking review.

II. The Ninth Circuit Court of Appeals Correctly Construed 25 U.S.C.§ 640d-7(a).

The statute's plain language extends the district court's jurisdiction to the Hopi and Navajo Tribes "and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934..." (Ex. D) (Emphasis added). No one disputes that Respondent claims an interest in the land at issue. The only question for jurisdictional purposes is whether it is a tribe. This is a matter for an evidentiary hearing according to the Ninth Circuit decision. See also Mashpee, supra.

Petitioner's argument that nearly all Paiutes are members of the Navajo Tribe whose interests are already represented by that Tribe assumes matters that will be at issue in the evidentiary hearing, i.e., whether the Paiutes exist as a distinct tribe.[3/]

The interpretation of 25 U.S.C. § 640d-7(a) adopted by the Ninth Circuit is strongly supported by the opinion

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3/Assuming arguendo that Respondent's counsel at oral argument spoke of Paiutes being "enrolled" in the Navajo Tribe, this merely points up the need for an evidentiary hearing, since it appears that in fact, many Paiutes were issued census numbers as Indians living on the Navajo Reservation many years ago and this census roll was adopted by the Navajo Tribe for enrollment purposes. Have any Paiutes actually enrolled? If so, was the enrollment voluntary? These and other issues need full factual development.

of the three judge court in Healing v. Jones, 210 F. Supp. 125, 130, 131 (D. Ariz. 1962), aff'd Jones v. Healing, 373 U.S. 758 (1963). Healing construed Publ. L. 85-547, 72 Stat. 403 (1958), which contained a similar jurisdictional grant for the district court to hear land claims (distinct from those here) of the Hopi, Navajo" and any other tribe of Indians claiming any interest," etc." There, the District Court stated:

> Under the 1958 act, the parties authorized to institute this litigation were empowered to name, as defendants, in addition to each other, "any other tribe of Indians claiming any interest in or to the area described in such Executive order* * *." The court has been advised by counsel that exhaustive studies and

> investigations conducted by field workers, historians and anthropologists have failed to reveal that any Indians or Indian tribes other than Hopis or Navajos have or claim any interest in any part of the 1882 reservation. Consequently the parties to this action, named above, did not join, as defendants, any other Indian or Indian tribe. Nor has any other Indian or Indian tribe sought to intervene or otherwise participate in this action, notwithstanding the fact that the pendency of this litigation has been given widespread publicity throughout the affected area.

210 F. Supp. at 130-131.

The Navajo and Hopi were represented in the Healing v. Jones litigation by the same law firms (or related law firms) as are involved in

this action. The quotation reveals a shared interpretation by counsel for the Hopi and Navajo, and the court that "any other tribes" means just what it says and encompasses unrecognized tribes. The Court's decision in Healing also clearly implies that it would have entertained an intervention by an unrecognized tribe.

Finally, the Petitioner is in error when it alleges there is nothing in 25 U.S.C. § 640d-7(a) providing jurisdiction for an award of land to the Paiutes (Pet. Br. p. 11). That provision explicitly provides for "quieting title thereto in the tribes," i.e., Hopi Navajo, and any other tribes making a claim. See pp. 3-4, supra.

The decision of the Ninth Circuit Court of Appeals was correct and needs no review.

III. The Motion To Intervene Was Timely in Light of All the Circumstances.

This Court has indicated that timeliness must be determined in light of all the circumstances. NAACP v. New York, 413 U.S. 345 (1973). The level of sophistication of applicants, here a poor unsophisticated tribe, has been considered crucial. Id. Applications for intervention as of right are to be treated liberally. Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir) (per curiam), cert. denied, 439 U.S. 837 (1978).

This litigation has proceeded at a snail's pace. Here, pretrial discovery is still in progress. The

Plan and Schedule of Discovery filed March 2, 1981 indicates depositions were to begin on July 1, 1981. All pretrial discovery was to be completed by December 31, 1982, but this was extended at the request of counsel for Petitioner. In requesting the extension, counsel for Petitioner correctly pointed out that "much of the eight years this case has been pending has been devoted to the decision and appeal of the basis upon which this case is now proceeding." The reference is to Sekaquaptewa v. McDonald, 448 F. Supp. 1183 (D. Ariz. 1978) aff'd in part, rev'd in part and remanded, 619 F.2d 801 (9th Cir. 1980), cert. denied, 449 U.S. 1010 (1980). That decision interpreted the Act of June 14, 1934. There is no

basis for arguing, as Petitioner does, (Brief pp. 13-14) that this interpretation will vary from tribe to tribe.

At the time the intervention was filed, the ground rules of the litigation had then only recently been decided in Sekaquaptewa v. McDonald, supra. The motion to intervene was timely filed. See Arizona v. California, _____U.S._____, 75 L.Ed.2d 318, 330-331 (1983) (Tribe's motion to intervene timely with respect to this phase of litigation).

Petitioner's statement that the March 1, 1984 pretrial has not been held as contemplated because of the uncertainty surrounding the Paiute participation is disingenuous. Petitioner's counsel requested an

extension of time because personnel changes in their firm had resulted in lack of supervision of the work of their expert witnesses and they were consequently not prepared. In addition, in a memorandum submitted in support of their request to set aside the pretrial date, they argued the date was unrealistic even without regard to the Paiute intervention.

Counsel for Respondents have indicated an ability to go to trial on the merits of the land claims by the time the Petitioner is ready.

The motion to intervene was timely.

CONCLUSION

The request for a writ of certiorari should be denied.

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